SUPREME COURT, U.S.
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No. 03-717

In the Supreme Court of the United States

ALLIANT ENERGY CORPORATION,
Petitioner,

v.

BURNEATTA BRIDGE, AVE M. BIE and ROBERT M. GARVIN, in their official capacities as Commissioners of the Wisconsin Public Service Commission,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

BRIEF IN RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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BRIEF IN RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Petitioner Alliant Energy Corporation ("AEC") respectfully submits that review of the Seventh Circuit's holding that Wis. Stat. § 196.795(5)(L) (the "In-State Incorporation Statute") of the Wisconsin Utility Holding Company Act, Wis. Stat. § 196.795 *et seq.* ("WUHCA"), violates the Commerce Clause is unnecessary because that holding was correct and the questions presented in AEC's Petition can be fully addressed without constitutional review of the In-State Incorporation Statute. However, AEC would not oppose a complete review of the decision below if the Court believes such review would assist it in determining the constitutionality of the WUHCA provisions AEC challenges.

STATEMENT

WUHCA regulates non-telecommunications public utility holding companies. A holding company is defined as "[a]ny company which, in any chain of successive ownership, directly or indirectly as a beneficial owner, owns, controls or holds 5% or more of the outstanding voting securities of a public utility, with the unconditional power to vote such securities." Wis. Stat. § 196.795(1)(h)1.a. Any person determined by the Public Service Commission of Wisconsin ("PSC") to exercise a controlling interest over a Wisconsin public utility may also be deemed a holding company. *See* Wis. Stat. § 196.795(1)(h)1.b.

Prior to the Seventh Circuit's decision below, any holding company governed by WUHCA was required to be incorporated in Wisconsin. *See* In-State Incorporation Statute. Thus, to own as few as 5%, or an even less controlling interest, of the shares of a Wisconsin public

utility, a holding company was required to be a Wisconsin corporation. Similarly, any corporation that sought to purchase a controlling interest in a Wisconsin utility holding company, and thereby indirectly through a chain of successive ownership, own, control or hold 5% or more of the voting shares of, or a less controlling interest in, a Wisconsin public utility, was required to be a Wisconsin corporation.

The Seventh Circuit reversed the district court and determined that the In-State Incorporation Statute violated the Commerce Clause. *See* App. at 23a, 37a. Relying on this Court's decision in *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), even though the Seventh Circuit thought that the In-State Incorporation Statute "f[e]ll[] under the *per se* rule," it invalidated the statute under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 147 (1970). *See* App. at 23a. The Seventh Circuit reasoned that "[i]f ownership of a Wisconsin utility company must lie with a Wisconsin Corporation, a potential article of interstate commerce, i.e., the investment in the utility, is stopped at [Wisconsin's] border." App. at 22a. The court further elaborated on the "balkanizing" effect of the In-State Incorporation Statute:

> Not only is it clear that the in-state incorporation provision regulates interstate commerce, but that the burdens produced by that regulation could be substantial. The requirement that a holding company be incorporated in Wisconsin requires that ultimate ownership lie in a Wisconsin corporation. To comply with this requirement a corporation could not just create a subsidiary; instead it would have to reincorporate the parent corporation in Wisconsin. If every State adopted this rule there would be no interstate investment in public utilities at all. No

holding company parent could own public utility companies in more than one State.

App. at 22a-23a.

REASONS WHY ACCEPTING THE CROSS-PETITION IS UNNECESSARY

Respondents ask this Court to review the portion of the Seventh Circuit's decision invalidating the In-State Incorporation Statute if the Court grants AEC's Petition. Respondents' rationale for their Cross-Petition is that, if the impermissible extraterritorial reach of the other challenged statutes results from the invalidation of the In-State Incorporation Statute, then "[t]he role that Wis. Stat. § 196.795(5)(L) played in the statutory scheme would become appropriate for consideration . . . ." Cross-Petition at 4. In short, Respondents argue that the In-State Incorporation Statute can be constitutionally justified because it is necessary to make the otherwise unconstitutional challenged statutes constitutional. *See* Resp. Br. at 12-13; App. at 24a.[1] The Seventh Circuit identified the glaring flaw in Respondents' reasoning:

> If the [Takeover Statute, Asset Cap and PSC Securities Regulation Statutes] are unconstitutional, the defendants argue, it is only because without in-state incorporation they affect the structure and financial activities of out-of-state holding companies.

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[1] In addition to the In-State Incorporation Statute, the challenged statutes are: Wis. Stat. §§ 196.795(3) (the "Takeover Statute"), 196.795(6m)(b) (the "Asset Cap") and 196.795(7)(a) and 201.01(2)) (the "PSC Securities Regulation Statutes").

> Recognizing this assumed constitutional weakness, Wisconsin has circumvented the problem by requiring that all holding companies be incorporated in Wisconsin. The in-state incorporation requirement, the argument goes, although otherwise unconstitutional is therefore saved by the fact that it is itself necessary to save the structural provisions, thus promoting regulation of financial activities and structure of local utilities. *One unconstitutional provision combines with another unconstitutional provision to create a constitutionally valid scheme.* We have serious reservations as to the merits of this sort of constitutional bootstrapping.

App. at 25a (emphasis added). Because the court upheld the Takeover Statute, Asset Cap and the PSC Securities Regulation Statutes, it did not reach the conclusion that inevitably follows from Respondents' argument: the coupling of a facially discriminatory regulation, the In-State Incorporation Statute, with statutes that otherwise regulate extraterritorial transactions involving non-Wisconsin entities does not produce a constitutionally acceptable alchemy.

The Seventh Circuit correctly held that the In-State Incorporation Statute violated the Commerce Clause, although it should have ruled that the statute is *per se* unconstitutional rather than simply violative of the *Pike* balancing test. In *Lewis,* this Court considered the constitutionality of a Florida statute that prohibited non-Florida bank holding companies from owning or controlling a business within Florida that offered investment advisory services to the public. 447 U.S. at 30-32. Bankers Trust, a New York corporation with its principal operations in New York, applied to operate an investment management subsidiary in Florida. When Bankers Trust's application was rejected because it conflicted with the

Florida statute, it challenged the statute under the Commerce Clause. A three-judge court declared that the Florida statute violated the Commerce Clause and enjoined its enforcement. *See id.* at 33.

Seizing on the challenged statute's discriminatory treatment of foreign companies, this Court identified the constitutional flaw:

> The statute makes the out-of-state location of a bank holding company's principal operations an explicit barrier to the presence of an investment subsidiary within the State . . . [and] thus prevents competition in local markets by out-of-state firms . . . .

Id. at 39. This Court found that Florida's interest in regulating financial practices could not justify the disparate treatment of out-of-state bank holding companies:

> [N]o basis [exists] for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power, that they are more likely to do so than their homegrown counterparts, or that they are any more inclined to engage in sharp practices than bank holding companies that are locally based. Nor is there any reason to conclude that outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils, particularly when other out-of-state businesses that may be just as large or far-flung are permitted to compete in the local market.

Id. at 43. The Court struck down the Florida statute. *See id.* at 44; *see also National Solid Waste Mgmt. Assoc. v. Meyer*,

63 F.3d 652, 661-62 (7th Cir. 1995) (applying *per se* scrutiny to invalidate Wisconsin statute because it created an embargo on waste from out-of-state waste haulers or out-of-state communities), *cert. denied*, 517 U.S. 1119 (1996).

Like the statute in *Lewis*, the In-State Incorporation Statute erects an impenetrable barrier against the entry of foreign utility holding companies and foreign ownership of public utility assets in Wisconsin and prevents competition in the local utility market by out-of-state firms. *Lewis*, 447 U.S. at 39. Inherent in this regulation is the assumption that foreign corporations are more likely than Wisconsin corporations to engage in some form of improper conduct which cannot otherwise be regulated by the state. No basis exists, however, "for an inference that all out-of-state [public utility] holding companies are likely to possess the evils [allegedly inherent in holding companies], that they are more likely to do so than their home grown counterparts, or that they are any more inclined to engage in sharp practices than [public utility] holding companies that are locally based." *Id.* at 43-44.

With the requirement of in-state incorporation to make as little as a 5% investment in a Wisconsin public utility, or a controlling investment in a Wisconsin utility holding company, a foreign corporation would be required to dissolve in its home state and re-incorporate in Wisconsin. That requirement involves significant transaction costs not imposed on Wisconsin corporations. *See* N.R. 079 at ¶¶ 3-15; *Government Suppliers Consol. Serv. v. Bayh*, 975 F.2d 1267, 1279 (7th Cir. 1992) (holding statute *per se* unconstitutional under the Commerce Clause where it "'rais[ed] the costs of doing business' for out-of state entities, 'while leaving those of their [in-state] counterparts unaffected,'" quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 351

(1977). Moreover, since 1998 non-United States corporations have become more active in the acquisition of U.S. utilities and utility holding companies. *See* N.R. 078 at ¶ 8; N.R. 081 at ¶ 11. Wisconsin's In-State Incorporation Statute entirely bars such foreign utility market participants from Wisconsin. These restraints against interstate utility investment transactions makes the In-State Incorporation Statute *per se* invalid. The Seventh Circuit, although on different grounds, correctly ruled that the In-State Incorporation Statute violates the Commerce Clause.

CONCLUSION

For the foregoing reasons, Alliant Energy Corporation respectfully submits that review of the Seventh Circuit's holding that the In-State Incorporation Statute is unconstitutional is unnecessary.

Respectfully submitted,

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